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Tai Choi Yu v Ma Boon Lan

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(IM)-916–05 OF 2016
DAVID WONG, HAMID SULTAN AND UMI KALTHUM JJCA
7 NOVEMBER 2017

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Civil Procedure — Preliminary objection — Inconsistencies — Appeal against decision of High Court judge — Whether there were inconsistencies with intitulement of appeal in relation to name of parties cited — Whether inconsistencies in scope of appeal — Whether inconsistencies grave and serious — Rules of Court 2012 O 1A

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This was an appeal by the appellant against the decision of the learned High Court judge in encls 49 and 57. On the day of hearing of the appellant's appeal, the respondent had raised preliminary objections on two grounds namely: (a) there were inconsistencies with the intitulement of the appeal in relation to the name of the parties cited; and (b) there were inconsistencies in the scope of the appeal. The respondent had objected to the inconsistencies as they were grave and serious in nature and that they would have a dire and serious effect on the respondent.

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Held, allowing the respondent's preliminary objections and striking out the appeal with costs of RM1,000:

(1) There was no competent appeal before the court. There were inconsistencies in relation to the scope of the appeal and there were indeed inconsistencies made to the names of the parties cited. The inconsistencies were grave in nature and fundamentally wrong as the appeal could not have proceeded without causing serious injustice and prejudice to the respondent. The inconsistencies were too obvious to be ignored and were not mere irregularities which could be cured under O 1A of the Rules of Court 2012 (see paras 10–12).

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[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan hakim Mahkamah Tinggi yang bijaksana di dalam lampiran 49 dan 57. Pada hari pendengaran rayuan perayu, responden telah membangkitkan bantahan awalan atas dua alasan iaitu: (a) terdapat ketidakselarasan dengan intitulmen rayuan berkaitan kepada nama pihak-pihak yang dirujuk; dan (b) terdapat ketidakselarasan dalam skop rayuan. Responden telah membantah kepada ketidakselarasan kerana ia adalah

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bersifat serius dan bahawa ia akan terdapat kesan teruk dan serius ke atas responden.

Diputuskan, membenarkan bantahan awalan responden dan membatalkan rayuan dengan kos sebanyak RM1,000:

(1) Tidak terdapat rayuan yang kompeten di hadapan mahkamah. Terdapat ketidakselarasan berkaitan kepada skop rayuan dan memang terdapat ketidakselarasan dibuat kepada nama-nama pihak-pihak yang dirujuk. Ketidakselarasan bersifat serius dan secara asas salah memandangkan rayuan tidak dapat diteruskan tanpa menyebabkan ketidakadilan dan prejudis yang serius kepada responden. Ketidakselarasan adalah terlalu jelas untuk diabaikan dan bukan hanya luar aturan yang tidak dapat dibetulkan di bawah A 1A Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 10–12).]

Notes

For cases on preliminary objection in general, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8100–8147.

Cases referred to

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149, FC (refd)

Legislation referred to

Rules of Court 2012 O 1A, O 16, O 18 r 19(1)(b), (1)(d), O 28 rr 1, 8, O 34 rr 1(3), (4), 2(2), O 92 r 4

Appeal from: Originating Summons No MYY 24–22/8 of 2014 (High Court, Miri)

Tai Choi Yu (Tai Choi Yu & Co) for the appellant.
Louis Achuk (Kadir, Wong Lin & Co) for the respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] This was an appeal by the second defendant/appellant against the decision of the learned High Court judge in encls 49 and 57.

[2] The learned High Court judge had allowed Ma Boon Lan's/third party's notice of application made under O 18 r 19(1)(b) and (d), O 16 and O 92 r 4 of the Rules of Court 2012 ('the Rules of Court') in encl 49 to set aside, strike

out and/or dismiss the second defendant's/appellant's statement of defence and counterclaim.

[3] The learned High Court judge had also dismissed the second defendant/appellant's application in encl 57 under O 34 r 1(3) and (4) and r 2(2) and O 28 rr 1 and 8 of the Rules of Court to dismiss the plaintiff's/Ma Suan Tong's claim, amongst others.

[4] The second defendant/appellant being dissatisfied with the above decisions now appeal to the Court of Appeal.

PRELIMINARY OBJECTION

[5] On the hearing day of the second defendant's/appellant's appeal on 20 April 2017, the respondent raised preliminary objections on two grounds, which preliminary objections he had intimated earlier to the second defendant/appellant vide his solicitor's letter ref APK/CT-42/2014 (2)/Lo dated 1 December 2016

[6] First, there were some inconsistencies with the intitulement of this appeal vide notice of appeal dated 14 April 2016, particularly in relation to the name of the parties cited. In the notice of appeal dated 14 April 2016, the appellant named was Tai Choi Yu and the respondent named was Ma Boon Lan. However, the intitulement in the memorandum of appeal dated 7 June 2016 and the rest of the cause papers and documents filed therein, the appellant named was Tai Choi Yu and the first respondent named was ma suan tong and the second respondent/third party named was Ma Boon Lan.

[7] Secondly, there was inconsistency in the scope of this very appeal. The appellant vide his notice of appeal indicated that he was appealing against the 'whole of the decision' of the learned High Court judge delivered on 6 April 2016 but in his memorandum of appeal, he stated that he was only appealing 'against part of the decision'.

[8] The respondent objected to these inconsistencies as they are grave and serious in nature. The respondent contended that these inconsistencies would have a dire and serious effect on the respondent as the respondent would be placed in a very difficult position to respond to this appeal. The respondent would also be highly prejudiced if this appeal is allowed to proceed as the scope and direction of this appeal are vague and uncertain.

[9] The appellant on the other hand contended that the appeal before the court was a fit and proper appeal and there would be no prejudice caused to the respondent. The appellant further argued that the respondent's preliminary

objections were frivolous and scandalous.

DECISION OF THE COURT

[10] Having perused the record of appeal filed herein particularly the notice of appeal and the memorandum of appeal and having examined the intitulement of this appeal, we were satisfied that there were indeed inconsistencies made to the names of the parties cited and there was in fact inconsistency in relation to the scope of this appeal.

[11] We were of the view that these inconsistencies were not only grave in nature but were also fundamentally wrong as this appeal could not have been proceeded without causing serious injustice and prejudice to the respondent. In other words, we were of the view that there was no competent appeal before us.

[12] Evidently, the inconsistencies were too obvious to be ignored and were not mere irregularities which can be cured under O 1A of the Rules of Court. In the Federal Court case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149, at para 46, p 163, Zaki Azmi (CJ as he then was) (delivering judgment of the court) held as follows:

> [46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. *Order 1A cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules*. Thus in this case, O 1A of the RHC does not apply as the respondents had intentionally disregarded O 6 r 7(2A) for their own reasons. (Emphasis added.)

In the absence of any application by the appellant/second defendant to amend the inconsistencies, and we noted that the appellant/second defendant had ample time to do so since 1 December 2016, prior to the hearing of this appeal, the preliminary objections by the respondent must be allowed.

[13] As such, it was our unanimous decision to allow the respondent's preliminary objections and accordingly this appeal was struck out with costs of RM1,000 subject to the payment of allocatur's fee. The deposit was to be refunded.

Respondent's preliminary objections allowed; appeal struck out with costs of RM1,000.

Reported by Fatin Mohd Ismail